85-913

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

CHARLES J. RESHA, JACK DICKENS and HOMER LEE SCOTT,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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ISSUES PRESENTED FOR REVIEW

1. DOES 18 U.S.C. SECTION 2517 AUTHORIZE THE DISCLOSURE AND USE OF LAWFULLY OBTAINED WIRETAP INFORMATION FOR THE PURPOSE OF MAKING CIVIL TAX ASSESSMENTS?

2. IS THE SUPPRESSION REMEDY PROVIDED FOR IN 18 U.S.C. SECTION 2515 AVAILABLE TO PETITIONERS WHEN LAWFULLY OBTAINED WIRETAP INFORMATION HAS BEEN DISCLOSED AND USED IN VIOLATION OF 18 U.S.C. SECTION 2517?

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UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioners Charles J. Resha, Jack Dickens and Homer Lee Scott, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on July 11, 1985, and its judgment denying a petition for rehearing and rehearing en banc entered on August 28, 1985.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit, entered July 11, 1985, is reported at 767 F.2d 285. The decision of the United States District Court for the Middle

District of Tennessee is reported at 573 F.Supp. 622. The opinions of the Court of Appeals and the District Court are included as Appendices to this petition.

JURISDICTION

The opinion of the United States Court of Appeals for the Sixth Circuit was filed on July 11, 1985. A petition for rehearing en banc was timely filed by Petitioners and was denied on August 28, 1985. The jurisdiction of this Court is invoked pursuant to Title 28, U.S.C. Section 1254(1).

STATUTES INVOLVED

18 U.S.C. Section 2510(7) provides:

> "(7) 'Investigative or law enforcement officer' means any officer of the United States or of a state or political subdivision thereof, who is empowered by law to conduct investigations of or to make arrests for offenses enumerated in this chapter, and any attorney authorized by law to prosecute or participate in the prosecution of such offenses."

18 U.S.C. Section 2515 provides:

> §2515. **Prohibition of use as evidence of intercepted wire or oral communications**
>
> Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

18 U.S.C. Section 2517 provides:

> §2517. **Authorization for disclosure and use of intercepted wire or oral communications**
>
> (1) Any investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire or oral communication, or evidence derived therefrom, may disclose such contents to another investigative or law enforcement officer to the extent that such disclosure is appropriate to the proper performance of the official duties of the officer making or receiving the disclosure.
>
> (2) Any investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire or oral communication or evidence derived therefrom may use such contents to the extent such use is appropriate to the proper performance of his official duties.
>
> (3) Any person who has received, by any means authorized by this chapter, any information concerning a wire or oral communication, or evidence derived therefrom intercepted in accordance with the provisions of this chapter may disclose the contents of that communication or such derivative evidence while giving testimony under oath or affirmation in any criminal proceeding in any court of the United States or of any State or in any Federal or State grand jury proceeding.
>
> (4) No otherwise privileged wire or oral communication intercepted in accordance with, or in violation of, the provisions of this chapter shall lose its privileged character.
>
> (5) When an investigative or law enforcement officer, while engaged in intercepting wire or oral communications in the manner authorized herein, intercepts wire or oral communication relating to offenses other than those

specified in the order of authorization or approval, the contents thereof, and evidence derived therefrom, may be disclosed or used as provided in subsections (1) and (2) of this section. Such contents and any evidence derived therefrom may be used under subsection (3) of this section when authorized or approved by a judge of competent jurisdiction where such judge finds on subsequent application that the contents were otherwise intercepted in accordance with the provisions of this chapter. Such application shall be made as soon as practicable.

STATEMENT OF THE CASE

On December 2, 1975 the United States on application of Verne Gauby, Special Agent of the Federal Bureau of Investigation, obtained an order for the interception of wire and oral communications of certain individuals, including the Petitioners, from the United States District Court for the Middle District of Tennessee, Judge L. Clure Morton. Agent Gauby affirmed in his application that the Petitioners were suspected of having violated 18 U.S.C. Sections 1955 and 1084 and that other methods of investigation were not sufficient to determine the guilt of the Petitioners.

After two weeks of intercepted communications, on December 16, 1975, Special Agent Gauby sought and obtained from the District Court an order authorizing the search of the premises of several individuals, including the Petitioners, based solely upon the intercepted communications, excerpts of which were typed and attached to the affidavit of the Special Agent filed in support of the application for search warrant. The application was granted, the premises of the Petitioners and others searched, and various documents were seized by Special Agents of the FBI who exclusively conducted the search. The evidence obtained, along with the intercepted wire communications, was placed in the office of the FBI in the Federal Courthouse in Nashville and there retained by the FBI under its sole and absolute authority.

After the raids upon the Petitioners, agents assigned to the Excise Tax Division of the Internal Revenue Service, saw news accounts of the raids and inquired of the FBI agents as to contents of the evidence seized. The Excise Tax Division of the IRS is charged with the responsibility of monitoring individuals engaged in wagering. Individuals engaged in wagering are required to register with the government, pay a registration fee of $500, and upon registration receive a gambling stamp. Upon receiving the gambling stamp the individual is required to pay the appropriate tax on gross wagers pursuant to 26 U.S.C. Section 4401, et seq. The Petitioners registered for the wagering stamp with the government pursuant to the Act, filed returns and paid tax upon their gross wagers. There was no concurrent investigation of the Petitioners by Revenue Agents of the IRS with the FBI at the time of the raids or at any time thereafter, even after Revenue Agents of the IRS obtained the evidence obtained by the wiretap.

Agents of the Excise Tax Division asked the FBI to allow them to review and copy whatever they wanted from the intercepted wire communications of the Petitioners and evidence derived therefrom. The FBI, without request of the issuing court, consented to the copying of the evidence seized by the IRS, and based solely upon the copied seized evidence, excise tax assessments were prepared and served upon the Petitioners.

At the time of the assessment, the Petitioners objected to the Revenue Agents of the IRS that use of the evidence derived from the wiretap was not permissible under the Act and specifically violated 18 U.S.C. Section 2517. Petitioners further asserted that continued reliance, use and possession of the wiretap evidence by the IRS was outside the scope of authority of the Revenue Agents. Petitioners contended that since the IRS was not allowed to obtain evidence by a wiretap it could not retain the seized evidence. Nonetheless, the Revenue Agents continued to retain, use, and rely solely upon the seized evidence and prepared and submitted a civil excise tax assessment to the Petitioners.

During the preparation of the civil assessment, the Revenue Agents forwarded the seized evidence to agents of the Criminal Investigation Division of the Internal Revenue Service. There was no joint civil and criminal investigation by the IRS of the Petitioners. The Criminal Division of the Internal Revenue Service declined prosecution. The Petitioners likewise were never indicted or prosecuted for the crimes they were alleged to have violated which was the basis for the order of the interception of Petitioners telephones in the first place. None of the evidence derived from the wiretap was ever introduced as evidence in any Court proceeding in connection with the prosecution of the Petitioners for any violation of the crimes asserted. Ultimately, all of the original evidence seized by the FBI was returned to the Petitioners by Agreed Order with the Attorney General for the Middle District of Tennessee. Unfortunately, copies of the evidence seized, made from the originals by the IRS were not returned.

Two of Petitioners, Dickens and Scott, filed suit in the District Court for the Middle District of Tennessee seeking to prohibit the use of the evidence seized, but the District Court and the Sixth Circuit Court of Appeals both held that such a suit was an attempt on the part of the taxpayer to enjoin the enforcement and assessment of a tax in violation of 26 U.S.C. §7421, the Anti-Injunction Statute. *Dickens v. United States,* 671 F.2d 969 (1982).

After the dismissal of the suit, the Petitioners exhausted their available administrative remedies, with continued objection to the use of the seized evidence by the IRS to no avail. Petitioners paid the excise tax, filed proper protests, and when no response by the government was filed within the time permitted by law, filed this suit for a refund pursuant to Title 28 Section 1346(a)(1).

THE DISTRICT COURT DECISION

In response to this suit for refund the Respondent filed an answer and counterclaim. After discovery and the depositions of the Revenue Agents involved in the preparation of the assessment, the Petitioners moved the District Court for summary judgment which was granted. In its response to Petitioners' motion for summary judgment, the Respondent argued there was no factual dispute and admitted that if suppression was ordered the Respondent had no other factual basis for the assessment. The Respondent relied upon its legal theory that the Internal Revenue Service Agents were "investigative or law enforcement officers" within the meaning of the Act entitled to disclosure and use pursuant to 18 U.S.C. §2517. The Respondent further argued in the event there was an improper disclosure and use, Petitioners were not entitled to the suppression of evidence remedy provided by 18 U.S.C. §2515.

The District Court held that the disclosure of the seized evidence from the FBI to the IRS, under the facts of this case, violated 18 U.S.C. Section 2517, and further that Petitioners were entitled to suppression of the seized evidence pursuant to 18 U.S.C. §2515. The District Court relied upon this Court's decisions in *United States v. Giordano,* 416 U.S. 505, 40 L.Ed.2d 341, 94 S.Ct. 1820 (1974) and *United States v. Chavez,* 416 U.S. 562, 40 L.Ed.2d 380, 94 S.Ct. 1849 (1974). The District Court specifically rejected the Respondent's argument that 18 U.S.C. Section 2518(10)(a)(i) should be applied in a limited scope and only to constitutional violations. The District Court held, relying upon *United States v. Donovan,* 419 U.S. 413, 50 L.Ed.2d 652, 97 S.Ct. 658 (1977), *United States v. Landmesser,* 553 F.2d 17 (6th Cir. 1977), and *United States v. Chun,* 503 F.2d 533 (9th Cir. 1974), on remand 386 F.Supp. 91 (D.C. Hawaii 1974), as adopted by the 4th, 5th, 7th and 8th Circuits,[1] that suppression is warranted if the Title III provision violated plays a central, or even functional, role in guarding against unwarranted use of wiretapping or electronic

surveillance. *Donovan, supra,* 429 U.S. at 437; *Landmesser, supra,* 553 F.2d at 22. District Judge Thomas A. Wiseman considered the following three tests adopted by the Circuits in granting Petitioner's motion for summary judgment and suppression of the evidence as follows:

1. Consider whether the provision violated is a central or functional safeguard in the statutory scheme to prevent abuses;

2. If the violation is central, consider whether the purpose the provision was designed to accomplish has been satisfied in spite of the violation;

3. Consider whether the violation was willful and prejudicial.

The District Court answered yes to each of these tests when applied to Petitioners factual predicament.

The Respondent appealed from the adverse decision of the District Court.

THE SIXTH CIRCUIT DECISION

The Sixth Circuit Court of Appeals reversed the District Court's decision and denied the Petitioners' request for rehearing en banc.

The Court of Appeals held that suppression was not an available remedy for Petitioners. The Court of Appeals did not address whether the use of the seized evidence by the IRS violated 18 U.S.C. Section 2517. The Court did however recognize the test to determine when suppression is an available remedy but held that none of the post-intercept requirements of

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[1] See *United States v. Diana,* 605 F.2d 1307 (4th Cir. 1979), *cert. denied,* 444 U.S. 1102; *United States v. Caggiano,* 667 F.2d 1176 (5th Cir. 1982); *United States v. Lawson,* 545 F.2d 557 (7th Cir. 1975); *United States v. Cirella,* 533 F.2d 1395 (8th Cir. 1976).

the Act, such as service of inventory notices, play a central role in limiting the use of intercept procedures. Citing the Third Circuit case of *United States v. Vento,* 533 F.2d 838, at 855 (3rd Cir. 1976), the Court of Appeals stated:

> "A motion to suppress does not appear to lie when the complaint is one of improper disclosure, rather than one of unlawful interception."

The Court of Appeals held that the District Court's finding there has been a separate post-interception intrusion of the Petitioners, regardless of whether it is permissible or not, does not require suppression when the interception itself was lawful. Even though the Court of Appeals reversed the District Court's decision, the Court of Appeals stated it would be a justifiable conclusion that suppression was a proper remedy for an unlawful disclosure of lawfully intercepted communications absent the legislative history and prior Supreme Court holdings.

REASONS FOR GRANTING THE WRIT

I. The Disclosure Of The Wiretap Evidence By The FBI To The IRS Violates 18 U.S.C. Section 2517.

The Court of Appeals, as stated, did not address that portion of the District Court's opinion which held that the disclosure of the seized evidence by agents of the FBI to Revenue Agents of the IRS was prohibited by 18 U.S.C. Section 2517. The Court of Appeals stated it was unclear when a disclosure is a permitted "use" within the meaning of 18 U.S.C. Section 2517(2), but held such a finding was irrelevant in light of the fact that no suppression remedy is afforded Petitioners.

Declining to determine whether the use was permissible makes application of the tests for suppression as established in *Giordano, supra,* 416 U.S. 505, *Chavez, supra,* 416, 526, *Landmesser, supra,* 553 F.2d 17, and *Chunn, supra,* 503 F.2d 533, virtually impossible to apply. Such a decision totally removes from the statutory scheme any hope of preventing unscrupulous government employees from abusing one's privacy which the Act seeks to protect.

Such a decision allows an individual's private thoughts to be disclosed to the public without adequate protection which conflicts with clear legislative intent of the Act. Such disclosure is nothing more than an arbitrary invasion by governmental officials, a fact well recognized by the District Court as follows:

> "Close judicial supervision of the procurement and use of surveillance evidence is constitutionally mandated, see *Katz v. United States,* 389 U.S. 347, 19 L.Ed.2d 576, 88 S.Ct. 507 (1967), and statutorily required, see Title III, Pub. L. No. 90-351, §801(b), 82 Stat. 211 (1968) (Congressional statement of findings). Unauthorized disclosure and use of surveillance evidence undermines this Judicial supervision principle. What was essentially a search and seizure of surveillance evidence by the IRS officer was conducted outside the judicial process."

The District Court thus correctly held that the disclosure by the FBI to the IRS of the contents and fruits of electronic surveillance conducted legally or illegally was in violation of 18 U.S.C. Section 2517.

II. The Willful And Prejudicial Violation Of 18 U.S.C. Section 2517 By The Unlawful Disclosure Violated A Central Protection Afforded Petitioners By The Act Which Was Not Otherwise Accomplished In Spite Of The Violation, Therefore Petitioners Are Entitled To Suppression As Provided In 18 U.S.C. Section 2515.

The Court of Appeals held that regardless of the nature of a post-interception violation, so long as the initial interception was lawful, the remedy of suppression is not available to Petitioners. The Court of Appeals concluded that the meaning of the Act is expressed in the legislative history and has been so construed by the Courts. The Court of Appeals went on to state, absent such statements of legislative intent and decisions of the Supreme Court, it would be a justifiable conclusion that suppression is the proper remedy of the Petitioners for an unlawful disclosure of lawfully intercepted communications and evidence derived from lawful interceptions.

The Court of Appeals' analysis is contrary to this Court's decisions, decisions of other Circuits, and the legislative history of the Act. Applying the clear language of this Court from *Giordano, supra,* 416 U.S. at 527 to the case at bar, the Court of Appeals decision is clearly erroneous. This Court in *Giordano* held in part:

> "The words 'unlawfully intercepted' are themselves not limited to constitutional violations, and we think Congress intended to require suppression where there is a failure to satisfy any of those statutory requirements that directly and substantially implement the congressional intention to limit the use of intercepted procedures to those situations

clearly calling for the employment of this extraordinary investigative devise."

The preamble to the Act states the purpose of the Act is to protect unlawful disclosure:

> (b) In order to protect effectively the privacy of wire and oral communications, to protect the integrity of the court and administrative proceedings, and to prevent the obstruction of interstate commerce, it is necessary for Congress to define on a uniform basis the circumstances and conditions under which the interception of wire and oral communications may be authorized, to prohibit any unauthorized interception of such communications, and the use of the contents thereof in evidence in court and administrative proceedings.
>
> (d) To safeguard the privacy of innocent persons, the interception of wire or oral communications where none of the parties to the communication has consented to the interception should be allowed only when authorized by a court of competent jurisdiction and should remain under the control and supervision of the authorizing court. Interception of wire and oral communications should further be limited to certain major types of offenses and specific categories of crime with assurances that the interception is justified and that the information obtained thereby will not be misused.
>
> 1 U.S. Code Congressional and Administrative News, 90th Congress, Second Session 1968 at p. 253.

The legislative history shows that Congress did not seek to limit remedies in any fashion but in fact sought to afford one whose privacy was violated several alternatives:

> Virtually all concede that the use of wiretapping or electronic surveillance techniques by private unauthorized hands has little justification where communications are in-

> tercepted without the consent of one of the participants. No one quarrels with the proposition that the unauthorized use of these techniques by law enforcement agents should be prohibited. It is not enough, however, just to prohibit the unjustifiable interception, disclosure, or use of any wire or oral communications. An attack must also be made on the possession, distribution, manufacture, and advertising of intercepting devices. All too often the invasion of privacy itself will go unknown. Only by striking at all aspects of the problem can privacy be adequately protected. The prohibition, too, must be enforced with *all* appropriate sanctions. Criminal penalties have their part to play. But other remedies must be afforded the victim of an unlawful invasion of privacy. Provision must be made for civil recourse for damages. *The perpetrator must be denied the fruits of his unlawful actions in civil and criminal proceedings. Each of these objectives is sought by the proposed legislation.*
>
> (emphasis added) 2 U.S. Code Congressional and Administrative News, 90th Congress, Second Session 1968 at 2156

In this case the evidence obtained was offered for a use that Congress specifically intended to prevent. 18 U.S.C. Section 2517 was drafted to limit disclosure to certain officials and law enforcement officers so as to protect against the unauthorized invasions of privacy. But for the disclosure by the FBI, the IRS would not have had access to the evidence. A decision in this case to grant the writ will in no way interfere with any purpose of effective law enforcement where the evidence seized is used in accordance with the purpose for which it was obtained.

CONCLUSION

Petitioners realize that in considering a petition for writ of certiorari, this Court is not, as a general rule, concerned primarily with whether the decision below is correct or incorrect but Petitioners understand that the Court is deeply concerned with the resolution of important questions of federal law. This latter concern should be paramount when, as in the present case, the District Court and the Court of Appeals have reached different results in applying an important interpretation to a statute that most courts recognize is not the picture of clarity. Because of the confusion in implementation of the safeguards afforded individuals by the Act, the Court should now take the opportunity to resolve the apparent confusion within the lower Courts. Moreover, as in this case, when this Court declines to end the confusion in so important an area, some citizens receive harsh and unforeseen results even when doubt exists about the wisdom of the decision. For these reasons, Petitioners earnestly request the Court to grant this petition for certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A

No. 84-5012
No. 84-5015
No. 84-5016

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Charles J. Resha (84-5012),
Jack Dickens (84-5015),
Homer Lee Scott (84-5016),
Plaintiffs-Appellees,

v.

United States of America,
Defendant-Appellant.

On Appeal from the
United States District
Court for the Middle
District of Tennessee.

Decided and Filed July 11, 1985

Before: Lively, Chief Judge; Krupansky, Circuit Judge; and Peck, Senior Circuit Judge.

Lively, Chief Judge. The government appeals from summary judgment in favor of the plaintiffs in this suit for a refund of wagering excise taxes, penalties and interest which the plaintiffs contended were erroneously and illegally assessed. The issue is whether evidence derived from a lawful wiretap during an investigation of criminal activities and later disclosed to revenue agents who use it for the purpose of making civil tax assessments is subject to suppression in an action to recover taxes paid pursuant to such assessment. The district court sup-

pressed the evidence and, since the assessments against the plaintiffs were based entirely on evidence derived from the wiretap, granted summary judgment.

I.

In the course of investigating alleged illegal gambling operations, agents of the Federal Bureau of Investigation (FBI) obtained wiretap orders pursuant to Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2520 (1982) (the Act or the Wiretap Act). On the basis of information intercepted pursuant to the wiretap order, the government then sought and obtained a search warrant for the plaintiffs' premises. During the search FBI agents seized various documents related to gambling activities. Though the plaintiffs were never indicted or tried for any offense designated in the wiretap order or the search warrants, there was considerable newspaper publicity surrounding the search. The FBI agents gave photocopies of some of the seized documents to agents of the Excise Tax Division of the Internal Revenue Service (IRS) and on the basis of the information contained in these copies the IRS computed additional assessments of excise wagering taxes. The plaintiffs objected to the assessments on the ground that the disclosure of the seized materials by the FBI agents to revenue agents of the IRS was not authorized by the Wiretap Act. The plaintiffs filed suit in the United States District Court seeking to prevent dissemination of the seized evidence. The district court dismissed that suit, and this court affirmed in *Dickens v. United States,* 671 F.2d 969 (6th Cir. 1982), on the ground that the claim was actually an attempt to enjoin the collection of a tax in violation of the Anti-Injunction Act, 28 U.S.C. § 2201 (1982).

The plaintiffs paid a portion of the wagering tax assessment, filed claims for refund which were denied, and then filed the present action. They contended that the assessment was unlawfully based upon evidence which was originally derived from the wiretap, that the FBI disclosed the wiretap evidence to

the IRS in violation of 18 U.S.C. § 2517, and that the evidence was subject to suppression under 18 U.S.C. § 2515.

On motion for summary judgment the district court held that the FBI agents violated § 2517 when they shared the documents with the IRS revenue agents. Sections 2517 provides in pertinent part:

> § 2517. Authorization for disclosure and use of intercepted wire or oral communications
>
> (1) Any investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire or oral communication, or evidence derived therefrom, may disclose such contents to another investigative or law enforcement officer to the extent that such disclosure is appropriate to the proper performance of the official duties of the officer making or receiving the disclosure.
>
> (2) Any investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire or oral communication or evidence derived therefrom may use such contents to the entent such use is appropriate to the proper performance of his official duties.
>
> (3) Any person who has received, by any means authorized by this chapter, any information concerning a wire or oral communication, or evidence derived therefrom intercepted in accordance with the provisions of this chapter may disclose the contents of that communication or such derivative evidence while giving testimony under oath or affirmation in any proceeding held under the authority of the United States or of any State or political subdivision thereof.

The district court concluded that since the disclosure was unauthorized, the evidence was subject to suppression pursuant to section 2515:

§ 2515. Prohibition of use as evidence of intercepted wire or oral communications

Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

Summary judgment followed since the government conceded that without the suppressed evidence it could not establish additional wagering tax liability.

In support of its decision the district court reasoned that the unauthorized disclosure extended the use of material derived from the surveillance beyond any necessary limit. The district court wrote, "Violation of section 2517 may not affect the judicial authorization of the original surveillance, but it is in essence a nonjudicially authorized additional intrusion. . . . Unauthorized disclosure is tantamount to unauthorized search and seizure. No difference exists between limiting the use of surveillance and limiting the use of the fruits of surveillance."

II.

On appeal the government argues that the disclosure by the FBI agents to the IRS revenue agents was proper under 18 U.S.C. § 2517(2) since this "use" of knowledge obtained pursuant to an authorized wiretap was "appropriate to the proper performance of [their] official duties." That is to say, since FBI agents are charged with investigating violations of all federal laws, § 2517(2) permits an FBI agent who has obtained information concerning the violation of tax laws while investigating other criminal activities to advise agents of the IRS of his fin-

dings. The plaintiffs respond that the federal wiretap statute does not authorize the use of wiretaps to investigate civil tax liability and thus it was no part of the duty of the FBI agents investigating alleged criminal activities to permit revenue agents of the IRS to have information obtained from the wiretap for use in computing civil tax assessments.

This issue was raised in *Fleming v. United States,* 547 F.2d 872 (5th Cir.) (per curiam), *cert. denied,* 434 U.S. 831 (1977). In its decision the court found that the wiretap statute is ambiguous on the question of disclosure and that the statute does not make clear the interaction between sections 2517 and 2515. However, the court in *Fleming* did not attempt to solve the ambiguity because it concluded that under the particular circumstances of that case the district court had correctly denied suppression. In *Fleming,* following an authorized wiretap, the defendant pled guilty to a charge of illegal gambling and the contents of the interception were introduced as evidence in the criminal proceedings. In a subsequent action for a refund of the additional assessment of wagering taxes which grew out of the wiretap, the taxpayer made the same argument that the plaintiffs make in this case. The court of appeals noted that there was reason to believe that the IRS revenue agents were covered by section 2517(2) and that it was a proper use of such evidence for the FBI agents to turn it over to the revenue agents. However, the actual holding in *Fleming* is narrow and appears to be based on the fact that the evidence obtained by the wiretap had been disclosed previously in the criminal proceedings. The court in *Spatafore v. United States,* 752 F.2d 415 (9th Cir. 1985), followed *Fleming.* In *Spatafore* there had been an indictment and proceedings in which the intercepted communications were made part of the public record in a criminal prosecution. Since the plaintiffs in this case were never indicted and the evidence was never introduced in criminal proceedings, neither the court in *Fleming* nor in *Spatafore* decided the central issue here.

III.

As did the Fifth Circuit, we find the language of the section unclear as to when a disclosure is permitted "use" within § 2517(2). However, we do not believe it is necessary in the present case to determine whether disclosure of the evidence to the revenue agents violated § 2517 since we conclude that the Act does not authorize suppression of the evidence in this action, regardless of whether the disclosure violated § 2517. We construe § 2515 to permit suppression of evidence only if that evidence was derived from unlawful, improper or unauthorized *interceptions* of wire or oral communications. It does not authorize suppression for *disclosures* of such information, even if they violate § 2517. This determination is based upon the legislative history of the Act and court decisions that require § 2515 to be read "in light of" 18 U.S.C. § 2518(10)(a), which provides in part:

> (10)(a) Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any wire or oral communication intercepted pursuant to this chapter, or evidence derived therefrom, on the grounds that—
>
> (i) the communication was unlawfully intercepted;
>
> (ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or
>
> (iii) the interception was not made in conformity with the order of authorization or approval.

In discussing § 2515 Congress explicitly stated, "[t]he provision [§ 2515] must, of course, be read in light of section 2518(10)(a) discussed below, which defines the class entitled to make a motion to suppress." S. Rep. No. 1097, 90th Cong., 2d Sess. 96, *reprinted in* [1968] U.S. Code Cong. & Ad. News 2112,

2185. In the later discussion of § 2518(10)(a), the report declared:

> This provision must be read in connection with sections 2515 and 2517, discussed above, which it limits. It provides the remedy for the right created by section 2515. * * * The motion [to suppress] may be made on the ground that: (i) the communication was unlawfully intercepted, (ii) the order of authorization or approval is insufficient on its face, or (iii) the interception was not made in conformity with the order.

S. Rep. No. 1097, *supra,* at 2195. In the present case the plaintiffs did not move to suppress on any of these grounds. The only basis of their motion was the allegedly unlawful disclosure of information by the FBI to the IRS.

The Supreme Court has consistently limited suppression under § 2515 to the grounds contained in § 2518(10)(a). In *United States v. Giordano,* 416 U.S. 505, 524-25 (1974), the Court stated:

> Section 2515 provides that no part of the contents of any wire or oral communication, and no evidence derived therefrom, may be received at certain proceedings, including trials, "if the disclosure of that information would be in violation of this chapter." What disclosures are forbidden, and are subject to motions to suppress, is in turn governed by § 2518(10)(a), which provides for suppression of evidence on the following grounds:
>
> > "(i) the communication was unlawfully intercepted;
> >
> > "(ii) the order of authorization or approval under which it was intercepted is insufficient on its face;
>
> or

> "(iii) the interception was not made in conformity with the order of authorization or approval."

(Footnote omitted). In *United States v. Chavez,* 416 U.S. 562, 571 (1974), a companion case to *Giordano,* the Court again identified the grounds for suppression under § 2515 as those contained in § 2518(10)(a). In *United States v. Donovan,* 429 U.S. 413, 432 (1977), the Court wrote:

> Section 2515 expressly prohibits the use at trial, and at certain other proceedings, of the contents of any intercepted wire communication or any evidence derived therefrom "if the disclosure of that information would be in violation of this chapter." The circumstances that trigger suppression under § 2515 are in turn enumerated in § 2518(10(a):
>
> > "(i) the communication was unlawfully intercepted;
> >
> > "(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or
> >
> > "(iii) the interception was not made in conformity with the order of authorization or approval."

In *Donovan* the Supreme Court reversed this court's decision in *United States v. Donovan,* 513 F.2d 337 (6th Cir. 1975). In upholding a district court suppression order, this court found that the government's failure to identify suspects whose communications had been intercepted and to serve inventory notices upon them rendered these communications "unlawfully intercepted" within § 2518(10)(a), requiring suppression. *Id.* at 343-44. Judge Engel dissented, arguing that the majority's construction ran "counter to standards for suppression set forth in *Giordano* and *Chavez.*" *Id.* at 345. Judge Engel noted that post-intercept requirements of the Act, such as service of inventory notices, have "little, if anything[,] to do with deterring improper initial resort to the [wiretap] procedure," and that this particular provision did not play a "central role" in "limiting the use of intercept procedures." *Id.*

The Third Circuit dealt directly with the availability of suppression for the unlawful disclosure of otherwise legally intercepted communications in *United States v. Vento,* 533 F.2d 838, 855 (3d Cir. 1976), stating:

> A motion to suppress does not appear to lie when the complaint is one of improper disclosure, rather than one of unlawful interception.

(Footnote omitted). See also *United States v. Iannelli,* 477 F.2d 999, 1001 (3d Cir. 1973), *aff'd on other grounds,* 420 U.S. 770 (1975) ("In any event the suppression remedy specified in 18 U.S.C. § 2518(10)(a) applies to unlawful interceptions. A civil remedy applies to unlawful disclosures. 18 U.S.C. § 2520.").

IV.

The district court held that an unauthorized disclosure is "in essence a non-judicially authorized additional intrusion." The court reached a similar conclusion in *United States v. Dorfman,* 690 F.2d 1217, 1228 (7th Cir. 1982), holding that under the Wiretap Act, "unlike the Fourth Amendment, the invasion of privacy is not simply 'over and done with' when an unlawful intrusion has been effected. Rather, the disclosure or use of information obtained through such an intrusion amounts to a separate injury to the victim's privacy interest." (Citation omitted). However, the finding that there has been a separate post-interception intrusion does not require suppression when the interception itself was lawful. This is the meaning of the Act as expressed in the legislative history and as construed by the courts.

Absent the statement of congressional purpose in S. Rep. No. 1097 and the Supreme Court holdings referred to earlier, it would be a justifiable conclusion that suppression is the proper remedy for an unlawful disclosure of lawfully intercepted communications and of evidence derived from lawful interceptions. Section 2515 prohibits the use of such communications and

evidence derived therefrom in all proceedings "if the disclosure of that evidence would be in violation of [the Wiretap Act]," and § 2517 limits the disclosures which may lawfully be made. Nevertheless, the legislative history and authoritative construction of the statute lead to the conclusion that the extreme remedy of suppression is authorized only when the interception itself was unlawful for one or more of the reasons set forth in § 2518(10)(a). The Act does create a civil action for damages, however. 18 U.S.C. § 2520.

The judgment of the district court is reversed, and the cause is remanded for further proceedings consistent with this opinion.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE,
NASHVILLE DIVISION

No. 81-3697

Homer Lee Scott

v.

United States of America

No. 3-82-0076

Jack Dickens

v.

United States of America

No. 3-82-0077

Charles J. Resha, III

v.

United States of America

MEMORANDUM

This action to recover the payment of wagering excise taxes, penalties, and interest[1] is before this Court on plaintiffs' motion for summary judgment. In their motion for summary judgment plaintiffs allege that the only evidence the internal Revenue Service used in assessing the wagering tax at issue was obtained in violation of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-20, and that suppression of the evidence is the proper remedy for this violation. Defen-

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[1] Plaintiffs file this cause of action pursuant to their authority to sue under 28 U.S.C. § 1346(a)(1) as amended.

dant opposes this motion, asserts that disclosure was proper, and contends that even if disclosure were unauthorized the Court should not suppress the evidence.

I. Background

Pursuant to court order, the FBI conducted electronic surveillance of plaintiffs to investigate alleged gambling operations.[2] The information gained from the wiretap was used by the FBI to obtain search warrants for the premises of several individuals, including plaintiffs. Agents seized various documents during the search, but plaintiffs have never been indicted or tried for any of the offenses designated in the wiretap order or search warrants. Nevertheless, local newspaper accounts of the raids aroused the curiosity of IRS agents, working in the Excise Tax Division, who inquired of the FBI about the information obtained in the search. Individuals engaged in wagering must pay an excise tax pursuant to 26 U.S.C. § 4401, *et seq.*, which plaintiffs had done. The IRS agents, however, wanted to investigate whether plaintiffs had paid the proper amount of tax. The FBI allowed the IRS agents to photocopy documents seized and from these documents the agents computed the additional assessment at issue in this case.

Plaintiffs objected to the assessments and filed protests with the IRS. In addition, plaintiffs filed suit for declaratory and injunctive relief in the Middle District of Tennessee, but their cause was dismissed for violation of the Anti-Injunction Act, 26 U.S.C. § 7421. The Sixth Circuit affirmed, *Dickens v. United States*, 671 F.2d 969 (6th Cir. 1982).[3] Plaintiffs subsequently

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[2] The surveillance warrant stated that plaintiffs were suspected of violating 18 U.S.C. § 1955 and § 1084.

[3] The Anti-Injunction Act provides that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed." 26 U.S.C. § 7421(a).

paid a portion of the assessment to the IRS and filed a protest, which was unanswered. This suit was then filed to recover the amount paid with interest, and costs including attorney fees. The complaint alleges first that the taxes were illegally assessed because they were based on information disclosed in violation of 18 U.S.C. § 2517, and second that 18 U.S.C. § 2515 requires suppression of the evidence obtained through the unauthorized disclosure. Defendants counterclaimed for the assessed taxes that remain unpaid. Plaintiffs then filed this motion for summary judgment.

This action is ripe for summary judgment because the determining issue is a legal rather than a factual one. Both parties essentially agree that whether or not the evidence obtained by the IRS from the FBI is suppressed will determine the lawsuit. Without the evidence the IRS cannot meet its burden of proving the plaintiffs' tax liability. *Griffin v. United States,* 588 F.2d 521, 528 (5th Cir. 1979).

Accordingly, and for the reasons stated below, this Court holds that the disclosure by the FBI to the IRS violates 18 U.S.C. § 2517 and that this violation merits suppression of the evidence disclosed. Consequently, the Court grants plaintiffs summary judgment and awards them the relief requested.

II. Disclosure Under Title III

Title III effectively prohibits all electronic surveillance not specifically provided for in the Act. S.Rep. No. 1097, *reprinted in* 2 U.S. Code Cong. & Admin. News 1968, 90th Cong., 2d Sess., at p. 2113; *United States v. Giordano,* 416 U.S. 505, 514, 40 L.Ed.2d 341, 353, 94 S.Ct. 1820, 1826 (1974). Inherent in that prohibition is a corresponding prohibition on the use of evidence obtained by electronic surveillance. *See* Title III, Pub. L. No. 90-351, § 801(b), 82 Stat. 211 (1968) (congressional statement of findings). Plaintiffs contend that the disclosure of surveillance evidence by the FBI to the IRS violates section 2517

of Title III. Defendant's position is that the disclosure is authorized in Title III by both section 2517(1) and section 2517(2).

Section 2517(1) provides:

> (1) Any investigative or law enforcement officer who, by any means authorized by this chapter [18 U.S.C. §§ 2510 et seq.], has obtained knowledge of the contents of any wire or oral communication, or evidence derived therefrom, may disclose such contents to another investigative or law enforcement officer to the extent that such disclosure is appropriate to the proper performance of the official duties of the officer making or receiving the disclosure.

Defendant argues that the FBI agent who disclosed the information and the IRS agent who received it are both investigative or law enforcement officers and that the disclosure was appropriate to the proper performance of the duties of either officer. In direct support of its position defendant cites *United States v. Iannelli*, 477 F.2d 999 (3d Cir. 1973), *aff'd on other grounds*, 420 U.S. 770 (1975).[4] The Third Circuit Court of Appeals in *Iannelli* concludes without explanation that "Internal Revenue Service agents are investigative or law enforcement officers within the meaning of 18 U.S.C. § 2510(7) and disclosure was appropriate to the performance of their duties. 18 U.S.C. § 2517(1)." *Iannelli, supra*, at 1001. This Court disagrees.[5]

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[4] *But see Fleming v. United States*, 547 F.2d 872, 875 n.4 (5th Cir. 1977).

[5] The court's holding in *Iannelli* is not as directly supportive of defendant's position as it may seem. *Iannelli* was a criminal prosecution rather than a tax refund suit, and violation of section 2517 was just one of many grounds on which defendant attempted to get surveillance evidence suppressed. The prosecution was for a crime designated in the surveillance warrant. Defendant in this case also cites as support *Fleming v. United States*, 547 F.2d 872 (5th Cir.

Section 2510(7) of Title III specifically defines "investigative or law enforcement officer" to mean

> any officer of the United States or of a State or political subdivision thereof, who is empowered by law to conduct investigations of or to make arrests for offenses enumerated in this chapter [19 U.S.C. §§ 2510 et seq.], and any attorney authorized by law to prosecute or participate in the prosecution of such offenses.

This provision clearly limits the officials authorized to make or receive § 2517(1) disclosures by defining investigative or law enforcement officer in terms of the enumerated offenses in section 2516, none of which concerns a violation of the Internal Revenue Code. To ignore the clear meaning of that limitation renders nugatory both section 2510(7) and section 2517.[6]

Defendant also argues that section 2517(2) authorizes the FBI disclosure in this case. Section 2517(2) provides:

> (2) Any investigative or law enforcement officer who, by any means authorized by this chapter [18 U.S.C. §§ 2510 et seq.], has obtained knowledge of the contents of any wire or oral communication or evidence derived therefrom may use such contents to the extent such use is appropriate to the proper performance of his official duties.

1977), and *Griffin v. United States,* 588 F.2d 521 (5th Cir. 1979). The Court in *Fleming* held surveillance evidence is already part of the public record of a prior criminal prosecution. The court declined to hold that the disclosure of the evidence to the IRS was authorized under section 2517, stating only that the provision "is not a model of clarity." The court held that whether or not the provision was violated, the evidence was admissible under the circumstances. The court in *Griffin* followed the decision in *Fleming. See infra* note 21. *But see James v. McKeever,* 33 A.F.T.R. ¶ 198,502 (D. Ariz. 1973).

[6] Section 2517 was drafted largely to allow close federal, state, and local cooperation in authorized investigations. S.Rep. No. 1097, *supra,* at 2188.

Defendant argues that an FBI agent may be said to be properly performing his duties by disclosing information relevant to the enforcement of the tax laws to the IRS. This argument fails for two reasons. First, if this disclosure were intended to be within the performance of the officer's duties in section 2517(2), then section 2517(1) would be totally unnecessary. Why would Congress limit disclosure in section 2517(1) only to throw it wide open in section 2517(2)? The only logical conclusion is that disclosure is not included in the definition of "use" as it is intended in section 2517(2). "Use" in section 2517(2) means use in the officer's own departmental investigation and prosecution. In the legislative history to Title III, Congress states that section 2517(2) "envisions use of the contents of intercepted communications, for example, to establish probable cause for arrest, to establish probable cause to search, or to develop witnesses." S.Rep. No. 1097, *supra,* at 2188 (citations omitted). The provision does not envision disclosure to any government official who happens to knock on the door.

Second, to extend the authorized disclosure of surveillance evidence beyond that defined in section 2517(1) would authorize unconstitutional invasions of privacy. The constitutional framework for Title III was derived from *Berger v. New York,* 388 U.S. 41, 18 L.Ed.2d 1040, 87 S.Ct. 1873 (1967), and *Katz v. United States,* 389 U.S. 347, 19 L.Ed.2d 576, 88 S.Ct. 507 (1967).[7] The Supreme Court in both *Berger* and *Katz* stated that it had approved the electronic surveillance in *Osborn v. United States,* 385 U.S. 323, 17 L.Ed.2d 394, 87 S.Ct. 429 (1966), because "no greater invasion of privacy was permitted than was necessary under the circumstances." *Berger, supra,* 388 U.S. at 56-57; *Katz, supra,* 389 U.S. at 355. Title III drafters balanced law enforcement interests and personal privacy interests as guaranteed by the fourth amendment in constructing a statute within the limits prescribed by *Berger* and *Katz.* The Supreme Court in *Berger* stated that the basic purpose of the fourth

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[7] Congress specifically drafted Title III to conform to the standards in *Berger* and *Katz.* S.Rep. No. 1097, *supra,* at 2153.

amendment, "as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions by government officials." *Berger, supra,* 388 U.S. at 53. Plaintiffs in this case had a protected privacy interest in their communications guaranteed by both the fourth amendment and Title III.[8] Title III and the fourth amendment allow invasions of that privacy for very particular and specific law enforcement uses as defined in a judicially authorized warrant.[9] The FBI in this case was judicially authorized to invade the plaintiffs' privacy to investigate violations of specific gambling laws. Plaintiffs retain a privacy interest in their communications for all other purposes. For the FBI to disclose the results of their investigation to IRS agents simply because the agents requested disclosure invades this privacy and in no way furthers the law enforcement interest judicially defined in the surveillance order. Such disclosure is

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[8] The Supreme Court in *Katz* stated:

> For the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. ... But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.

Katz, supra, 389 U.S. at 351.

[9] Arguably, the plain view exception to the warrant requirement of the fourth amendment defined by the Supreme Court in *Coolidge v. New Hampshire,* 403 U.S. 443, 29 L.Ed.2d 564, 91 S.Ct. 2022 (1971), is codified for electronic surveillance in section 2517(5). Section 2517(5) requires a judicially approved retroactive amendment to the surveillance warrant to include any "plain view" seizures relating to undesignated crimes. Thus, although section 2517(5) allows intrusions beyond those specified in the surveillance warrant, it applies only to authorized officials and requires close judicial supervision. Section 2517(5) in no way authorizes disclosure of information seized relating to designated or undesignated crimes, and in fact provides that no evidence of other crimes may be admitted without timely judicial amendment to the warrant. *See* Goldsmith, *The Supreme Court and Title III: Rewriting the Law of Electronic Surveillance,* 74 J. Crim. Law & Criminology 1, 141-50 (1983).

nothing more than "an arbitrary invasion by government officials."[10] To interpret Title III as authorizing disclosure under these circumstances would leave the doors open for widespread invasions of privacy in violation of the fourth amendment and against the clear legislative intent of the statute. Thus, the Court holds that the disclosure by the FBI to the IRS of the contents or fruits of electronic surveillance conducted legally or illegally is in violation of 18 U.S.C. § 2517.

II. Suppression

Defendant argues that, even if the FBI disclosure violates section 2517, the violation should not be suppressed because section 2515, the Title III suppression remedy, requires suppression only when the surveillance itself was illegal. This argument, although adopted by some lower courts,[11] totally ignores the Title III suppression analysis developed by the Supreme Court in *United States v. Giordano,* 416 U.S. 505, 40 L.Ed.2d 341, 94 S.Ct. 1820 (1974), and *United States v. Chavez,* 416 U.S. 562, 40 L.Ed.2d 380, 94 S.Ct. 1849 (1974).[12] *See also* Goldsmith, *The Supreme Court and Title III: Rewriting the Law of Electronic Surveillance,* 74 J. Crim. Law & Criminology 1, 76-112 (1983).

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[10] Close judicial supervision of the procurement and use of surveillance evidence is constitutionally mandated, *see Katz, supra,* 389 U.S. at 356, and statutorily required, *See* Title III, Pub. L. No. 90-351, § 801(b), 82 Stat. 211 (1968) (congressional statement of findings). Unauthorized disclosure and use of surveillance evidence undermines this judicial supervision principle. What was essentially a search and seizure of surveillance evidence by the IRS officer was conducted outside the judicial process.

[11] *See, e.g., Iannelli, supra; Fleming, supra; United States v. Horton,* 601 F.2d 319 (7th Cir. 1979), *cert. denied,* 444 U.S. 937.

[12] The Supreme Court's suppression analysis developed in *Giordano* and *Chavez* was further refined in *United States v. Kahn,* 415 U.S. 143, 39 L.Ed.2d 25, 94 S.Ct. 977 (1974); and *United States v. Donovan,* 429 U.S. 413, 50 L.Ed.2d 652, 97 S.Ct. 658 (1977).

Section 2518(10)(a) lists the following three bases for which an aggrieved party may move for suppression under section 2515:

> (i) the communication was unlawfully intercepted;
> (ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or
> (iii) the interception was not made in conformity with the order of authorization or approval.

Defendant in this case contends that plaintiffs when they allege improper disclosure do not allege any of these section 2518(10)(a) violations. Presumably defendant is arguing for a narrow interpretation of "intercept" in section 2518(10)(a)(i) that includes only constitutional violations. The Supreme Court, however, specifically rejected this argument in *Giordano, supra,* 416 U.S. at 527, and held that

> [t]he words "unlawfully intercepted" are themselves not limited to constitutional violations, and we think Congress intended to require suppression where there is failure to satisfy any of those statutory requirements that directly and substantially implement the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device.

As stated by the Supreme Court in *Donovan,* and as applied by the Sixth Circuit Court of Appeals in *United States v. Landmesser,* 553 F.2d 17 (6th Cir. 1977), suppression is warranted if Congress intended the Title III provision that was violated to play "a central, or even functional, role in guarding against unwarranted use of wiretapping or electronic surveillance." *Donovan, supra,* 429 U.S. at 437; *Landmesser, supra,* 553 F.2d at 22. In addition, some courts have interpreted the Supreme Court's decision in *Chavez* to imply that even violations of a central provision will not require suppression if the purpose the provision was designed to accomplish has been satisfied in spite

of the violation.[13] The Supreme Court also discussed in *Donovan, supra,* 429 U.S. at 436 n.23, 439 n.26, and the Sixth Circuit considered significant in *Landmesser, supra,* 553 F.2d at 22, the wilfullness of the violation and any resulting prejudice. In fact, most jurisdictions recognize that intentional violations of even noncentral provisions may require suppression. See Goldsmith, *supra,* at 119. The Ninth Circuit in *United States v. Chun,* 503 F.2d 533 (9th Cir. 1974), *on remand* 386 F. Supp. 91 (D.C. Hawaii 1974), organized these considerations into the following three part test that since has been adopted by the Fourth, Fifth, Seventh, and Eighth Circuits.[14] (1) Consider whether the provision violated is a central or functional safeguard in the statutory scheme to prevent abuses; (2) If the violation is central, consider whether the purpose the provision was designed to accomplish has been satisfied in spite of the violation; (3) Consider whether the violation was wilful and prejudicial.

Applying all of these considerations to the violation by defendant of section 2517, this Court finds that the provision is central to the Title III statutory scheme, that the purpose of the provision was not accomplished in spite of the violation of the provision by the FBI, and that the violation was wilful and prejudicial.

Violation of provisions of Title III considered "post-intercept" provisions, such as the section 2518(8)(a) sealing requirement and the section 2518(8)(d) notice requirement, generally have been held by most courts not to merit suppres-

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[13] *See infra* note 14 and cases listed therein.

[14] *See United States v. Diana,* 605 F.2d 1307 (4th Cir. 1979), *cert. denied,* 444 U.S. 1102; *United States v. Caggiano,* 667 F.2d 1176 (5th Cir. 1982); *United States v. Lawson,* 545 F.2d 557 (7th Cir. 1975); *United States v. Civella,* 533 F.2d 1395 (8th Cir. 1976).

sion absent wilfullness and prejudice.[15] The reasoning of these courts has been that post-intercept violations would not have precluded judicial authorization and thus are not central to the congressional intention to limit the use of intercept procedures. *See, e.g., Donovan, supra,* 429 U.S. at 435. In other words, compliance with post-intercept requirements does not lessen the invasion of privacy by the government and thus, absent a showing of prejudice, violations of these provisions should be considered "harmless errors."[16]

The section 2517 disclosure provision is a post-intercept requirement, but the provision differs markedly from the other post-intercept provisions because an unauthorized disclosure is an additional invasion of privacy. Unauthorized disclosure extends the use of the results of the surveillance beyond that necessary to the circumstances, in direct violation of congressional intention and constitutional requirements. Whether the violation would have affected the intrusion of the original surveillance is not the only consideration in this case. Violation of section 2517 may not affect the judicial authorization of the original surveillance, but it is in essence a nonjudicially authorized additional intrusion. Violation of the sealing requirement, for example, absent evidence of tampering, does not result in an additional intrusion into the constitutionally protected privacy of the aggrieved individual. Violation of the nondisclosure requirement does. Moreover, the additional intrusion is accomplished with none of the required statutory and

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[15] *See* C. Fishman, Wiretapping and Eavesdropping § 255 (1978 & 1982 Supp.); J. Carr, The Law of Electronic Surveillance § 6.03 (1977 & 1983 Supp.); Goldsmith, *supra,* note 9, at 154.

[16] *See* J. Carr, *supra* note 15, at 355.

constitutional safeguards.[17] Unauthorized disclosure is tantamount to unauthorized search and seizure. No difference exists between limiting the use of surveillance and limiting the use of the fruits of surveillance. To conclude that central to congressional intention is the limitation of surveillance, requires the conclusion that also central to that intention is the limitation of the disclosure of surveillance results.

In addition, the purpose of limiting disclosure — to limit the intrusion — also has not been met in this case.[18] Although the

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[17] For example, the IRS was not required to show probable cause for access to the surveillance materials, they were not reqired to particularize their search but were given general perusal of all documents seized under the FBI warrant, and they were not required to show exhaustion of investigative alternatives. In fact, the IRS failed even to use their authority to summon plaintiffs' tax records before resorting to a search of the surveillance evidence.

[18] The Fifth Circuit Court of Appeals in *Fleming* and *Griffin, supra* note 5, reasoned in those cases that the purposes of limiting disclosure would not be furthered by suppression of evidence disclosed by the FBI to the IRS. In both *Fleming* and *Griffin* the evidence had been presented previously in court, one in a criminal prosecution and the other at the time defendant entered a guilty plea. The court reasoned that the introduction of the surveillance evidence into a public forum deprived the parties of any further privacy interest in their communications. In addition, the court found no evidence that the surveillance by the FBI was a pretext for obtaining evidence for the IRS. This Court does not adopt the analysis of the Fifth Circuit, but finds nevertheless that the evidence in this case merits suppression even under the standards of *Fleming* and *Griffin*. No evidence of pretext exists in this case, but the lack of any criminal prosecution of plaintiffs throws the balance on that issue more towards their favor. Moreover, the lack of prosecution distinguishes this case from *Fleming* and *Griffin* because here the surveillance evidence was never introduced as evidence at trial. Defendants argue that the evidence was submitted when the plaintiffs sued for injunctive and declaratory relief, but that suit was essentially a suppression motion, and the introduction of evidence in a suppression motion can hardly be said to negate any privacy interest in that evidence. If so, then suppression hearings would be self-defeating.

Court takes no position on the issue at this time, situations may exist in which unauthorized disclosure does not mandate suppression because suppression would not further the purpose or policy behind section 2517. For example, the FBI violation of section 2517 might not require suppression of this evidence in a criminal prosecution for the crime for which the original warrant was obtained, had one resulted.[19] In that case the prosecution would have had judicially authorized access to the evidence with or without the disclosure; thus, admission is not an additional intrusion caused by the disclosure. In this case, however, the evidence is being offered for a use that Congress specifically intended to prevent. Section 2517 was drafted to limit disclosure to certain officials to protect against the unauthorized invasions of privacy resulting from the widespread use of the fruits of surveillance. But for the disclosure, defendants would not have access to the evidence. Moreover, any purpose of effective law enforcement that issuance of this surveillance warrant served will not be burdened by suppression of the evidence here.

Finally, even if section 2517 were considered a noncentral provision of Title III, suppression should result because the violation was intentional[20] and prejudicial. *See Chun, supra,* at 542-43; *Donovan, supra,* 429 U.S. at 436 n.23, 429 n.26.

Defendant argues that the proper remedy for a section 2517 violation is a section 2520 civil suit for damages. Nothing in section 2520 or its legislative history, however, suggests that it is meant to be an exclusive remedy in any situation. Certainly plaintiffs in this case at one time had the option of a section 2520 remedy, but that option in no way precludes section 2515 suppression.

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[19] *See, e.g., Iannelli, supra* note 5.

[20] Nowhere does defendant assert that the disclosure was accidental or unintentional.

Accordingly, the Court grants plaintiffs summary judgment and awards them the relief requested, specifically refund of the illegally assessed taxes with interest. *United States v. Jones,* 542 F.2d 661 (6th Cir. 1976).

/s/ Thomas A. Wiseman, Jr.
United States District Judge

APPENDIX C

No. 84-5012/5015/5016

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Charles J. Resha (84-5012)
Jack Dickens (84-5015)
Homer Lee Scott (84-5016)
Plaintiffs-Appellees

v.

United States of America,
Defendant-Appellant

ORDER

(Filed Aug. 28, 1985)

BEFORE: LIVELY, Chief Judge, KRUPANSKY, Circuit Judge, and PECK, Senior Circuit Judge

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman, Clerk

Supreme Court, U.S.
FILED
FEB 28 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-913

In the Supreme Court of the United States

OCTOBER TERM, 1985

CHARLES J. RESHA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
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Department of Justice
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CHARLES J. RESHA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that the federal wiretap statute forbids the use of certain search warrant evidence to support the Commissioner's assessments of wagering excise taxes.

1. Petitioners were the subject of an FBI investigation into a gambling operation that was suspected to be in violation of 18 U.S.C. 1084 and 1955 (Pet. App. A12 n.2). As part of that investigation, FBI agents secured a court order authorizing the interception of certain telephone conversations pursuant to the federal wiretap statute, 18 U.S.C. 2510 *et seq.* Based upon information obtained through those court-authorized wiretaps, the FBI agents sought and obtained search warrants for petitioners' premises. The agents executed the warrants and seized various documents related to gambling activities. Pet. App. A2, A12.

Although petitioners were not criminally prosecuted for any gambling offenses, there was considerable newspaper publicity surrounding the search. As a result of that

publicity, agents from the Excise Tax Division of the Internal Revenue Service communicated with the FBI and requested permission to photocopy the documents that the FBI had seized. That permission was granted. Based on the photocopied documents, the IRS made wagering excise tax assessments against petitioners. Pet. App. A2, A12.

Petitioners eventually paid a portion of the assessments and, upon denial of their claims for refund, filed these refund suits in the United States District Court for the Middle District of Tennessee (Pet. App. A2, A12-A13). The government counterclaimed for the unpaid balance of the tax assessments, for civil fraud penalties, and for interest (*id.* at A13). Petitioners moved for summary judgment, contending that the wiretap data, while lawfully intercepted by the FBI, had been unlawfully disclosed to the IRS. Petitioners further contended that the proper remedy for this allegedly improper disclosure was suppression of the search warrant evidence and that, lacking the search warrant evidence, the IRS tax assessments were unsupportable. The government "conceded that without [such] evidence it could not establish additional wagering tax liability" and hence agreed that petitioners' motion for summary judgment was ripe for decision (*id.* at A4, A13). The government did not file a cross-motion for summary judgment.

The district court ruled for petitioners (Pet. App. A11-A24). It held that the wiretap data had been unlawfully disclosed by the FBI to the IRS in violation of 18 U.S.C. 2517 (Pet. App. A13-A18), and it concluded that the prescribed statutory remedy for that disclosure was suppression of the search warrant evidence pursuant to 18 U.S.C. 2515 (Pet. App. A18-A23). In view of the government's concession that the IRS had no other evidence to support its wagering tax assessments, the court granted summary judgment to petitioners on their refund claim.

The court of appeals unanimously reversed (Pet. App. A1-A10). It found no need to decide whether the FBI's disclosure of the wiretap data was unlawful (*id.* at A6). Rather, it held that Section 2515 authorizes suppression only where the wiretap *interception* is unlawful for one of the reasons specified in Section 2518(10)(a), and not (as here) where lawfully-intercepted wiretap data are allegedly disclosed in violation of Section 2517 (Pet. App. A6-A10). The court did not reach the government's other arguments.[1] The court of appeals accordingly reversed the judgment of the district court and "remanded [the case] for further proceedings consistent with [its] opinion" (Pet. App. A10).

2. Petitioners here reiterate their contention that 18 U.S.C. 2515 mandates suppression of the search warrant evidence. Whatever the merits of petitioners' contention, it is not now ripe for review by this Court. The court of appeals' decision places petitioners in precisely the same position they would have occupied had the district court in the first instance denied their motion for summary judgment; appellate review could not have been obtained prior to trial on the merits of their refund claims and of the government's counterclaims. Both the question of petitioners' correct tax liabilities for the years at issue, and the question of their liability for civil fraud penalties, remain to be decided on remand. If petitioners prevail on remand, the claim they seek to present here will be moot. If, on the other hand, the government prevails in whole or in part on

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[1]The government alternatively argued that, because the IRS had relied solely on the documents seized by the FBI pursuant to the search warrants, the dissemination and use of those documents was not governed by the federal wiretap statute at all. And the government contended that suppression was inappropriate in any event because the search warrant evidence had been disclosed voluntarily by petitioners Dickens and Scott when they attached those documents as an exhibit to their complaint in a previous injunction action. Appellant's C.A. Br. 7, 25.

remand, and if the government's position is sustained on appeal, petitioners will then be able to present their claim, together with any other claims they may have, in a petition for a writ of certiorari seeking review of a final judgment against them. Accordingly, review of the court of appeals' decision would be premature at this time.[2]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

FEBRUARY 1986

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[2]Because this case is in an interlocutory posture, we are not responding on the merits to the questions presented by the petition. We will do so if the Court requests.

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